



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

EPA-HQ-OAR-2014-0464; FRL-10024-27-OAR

Air Quality Designations for the 2010 1-Hour SO₂ NAAQS: Responses to Petitions for Reconsideration and Administrative Stay of the Designations for Portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County in Texas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of actions denying petitions for reconsideration and administrative stay.

SUMMARY: The Environmental Protection Agency (EPA) is providing notice that it has responded to petitions for reconsideration and/or administrative stay of a final action under the Clean Air Act (CAA) published in the *Federal Register* on December 13, 2016, titled, “Air Quality Designations for the 2010 Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard—Supplement to Round 2 for Four Areas in Texas: Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County.” The EPA has denied these petitions in letters to the petitioners for the reasons that the EPA explains in those documents.

DATES: The Administrator signed the associated notification letters on June 10, 2021.

FOR FURTHER INFORMATION CONTACT: Corey Mocka, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Policy Division, 109 T.W. Alexander Drive, Mail Code C539-04, Research Triangle Park, N.C. 27711; phone number: (919) 541-5142; email address: mocka.corey@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The EPA is providing notice that it has responded to petitions for reconsideration and/or administrative stay of a final action under the CAA published in the *Federal Register* on December 13, 2016, titled, “Air Quality Designations for the 2010 Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard—Supplement to Round 2 for Four Areas in Texas:

Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County” (81 FR 89870). On February 13, 2017, Vistra Energy submitted a petition requesting that the EPA reconsider and stay the effective date of the EPA’s nonattainment designations for portions of Freestone and Anderson Counties, Rusk and Panola Counties, and Titus County. Vistra Energy later supplemented this petition on December 19, 2017. On March 15, 2017, the Texas Commission on Environmental Quality (TCEQ) submitted a request for administrative stay of the effective date for the EPA’s final designations for these areas in Texas. The TCEQ also submitted a petition for reconsideration of the nonattainment designations on December 11, 2017. The EPA has denied these petitions in letters to the petitioners for the reasons that the EPA explains in those documents.

II. Where Can I Get Copies of This Document and Other Related Information?

This *Federal Register* document, the petitions for reconsideration and administrative stay, and the response letters to the petitioners are available in the docket that the EPA established for the rulemaking, under Docket ID NO. EPA-HQ-OAR-2014-0464.

All documents in the docket are listed in the index at <http://www.regulations.gov>. Although listed in the index, some information may not be publicly available, *i.e.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Out of an abundance of caution for members of the public and our staff, the EPA is temporarily suspending the Docket Center and Reading Room for public visitors to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information and updates on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets>. The EPA continues to carefully and continuously monitor information from the Centers for Disease

Control and Prevention, local area health departments, and our federal partners so we can respond rapidly as conditions change regarding COVID-19.

In addition, the EPA has established a website for SO₂ designations rulemakings at: <https://www.epa.gov/sulfur-dioxide-designations>. This *Federal Register* notice, the petitions for reconsideration and administrative stay, and the response letters denying the petitions are also available on this website along with other information.

III. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the Court of Appeals for the District of Columbia Circuit: (i) When the agency action consists of “nationally applicable regulations promulgated, or final actions taken, by the Administrator,” or (ii) when such action is locally or regionally applicable, if “such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.” For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii). Judicial challenges to the EPA’s denials of petitions for reconsideration of CAA actions belong in the same venue as any challenge to the action that such petitions request the agency to reconsider.¹

The D.C. Circuit is the only appropriate venue for both challenges to the final action titled, “Air Quality Designations for the 2010 Sulfur Dioxide (SO₂) Primary National Ambient Air Quality Standard—Supplement to Round 2 for Four Areas in Texas: Freestone and Anderson Counties, Milam County, Rusk and Panola Counties, and Titus County,” 81 FR 89870 (December 13, 2016) (“Round 2 Supplement”) and challenges to these actions denying administrative petitions on the Round 2 Supplement. The EPA made a finding in the Round 2 Supplement, that the Round 2 Supplement is based on a determination of “nationwide scope or

¹ *Cf. Natural Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1249 (D.C. Cir. 1988) (the clause in CAA section 307(b) governing “nationally applicable regulations” provides jurisdiction over both the direct challenge to the regulations and the petition for reconsideration).

effect” within the meaning of CAA section 307(b)(1). *See* 81 FR at 89874-75. That action is currently being challenged in the Court of Appeals for the Fifth Circuit; however, the EPA maintains that the proper venue for that action is the D.C. Circuit.² Thus, judicial challenges to the actions noticed here, denying administrative petitions for reconsideration and/or stay of the Round 2 Supplement, also belong in the D.C. Circuit.

To the extent a court finds these actions denying the administrative petitions on the Round 2 Supplement to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that each of these actions are based on a determination of “nationwide scope or effect” within the meaning of CAA section 307(b)(1).³ Both the Round 2 Supplement and these final actions noticed here are finalized pursuant to a common, uniform nationwide analytical method and interpretation of CAA section 107(d). In denying the petitions for reconsideration and administrative stay of the Round 2 Supplement, these final actions apply the same common, uniform nationwide analytical method and interpretation of CAA section 107(d) that the EPA applied across the country in designations for the SO₂ Primary National Ambient Air Quality Standard (NAAQS), including the EPA’s nationwide approach to and technical evaluation of air quality modeling and monitoring data within the EPA’s interpretation of statutory terms under section 107(d)(1) of the

² The EPA intends to maintain this position in merits briefing in the 5th Circuit, as the 5th Circuit’s venue decision denied the EPA’s motion to dismiss or transfer the case to the D.C. Circuit without prejudice to reconsideration of the issue by the merits panel. *Texas v. EPA*, 706 Fed. Appx. 159, 161, 165 (5th Cir. 2017) (“EPA’s motion therefore is denied without prejudice to reconsideration by the merits panel...merits briefing will provide greater clarity on what determinations lie at the [Round 2] Supplement’s core, by, for example, illuminating that the key determinations in the rule are determinations that specific methodologies are appropriate or preferable for assessing sulfur dioxide levels nationwide, as opposed to fact-specific assessments of sulfur dioxide levels in the four Texas regions. In that case, the merits panel should not be constrained from revisiting the issue.”).

³ In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator has also taken into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit’s authoritative centralized review versus allowing development of the issue in other contexts and the best use of agency resources.

CAA.⁴ These final actions are based on this same common core of determinations regarding the nationwide analytical method and interpretation of CAA section 107(d), determinations that specific methodologies are appropriate or preferable for assessing sulfur dioxide levels nationwide.⁵ More specifically, these final actions are based on a determination by the EPA to evaluate areas nationwide using a common five-factor analysis in determining whether areas are in violation of or contributing to an area in violation of the 2010 SO₂ NAAQS at the time of the designations final action. The actions denying the petitions for reconsideration explained, for example, that the EPA's designations and the denials for reconsideration are based on the EPA's determination to consider and assess the technical representativeness of all available information regarding then-current air quality at the time of designations (*e.g.*, to consider third party modeling submitted to the EPA of the then-most recent years of air quality and then-currently available monitoring information, and not to consider projections or intended monitoring of future years' emissions, for SO₂ designations under the CAA). For these reasons, the Administrator is exercising the complete discretion afforded to him by the CAA and hereby finds that each of these final actions is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is hereby publishing those findings in the *Federal Register*.

Under CAA section 307(b), any petition for review of these actions denying the petitions for reconsideration and/or stay must be filed in the Court of Appeals for the District of Columbia Circuit within 60 days from the date this notice is published in the *Federal Register*. Filing a petition for reconsideration by the Administrator of these final actions does not affect the finality of the actions for the purposes of judicial review, nor does it extend the time within which a

⁴ In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that the "nationwide scope or effect" exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95-294 at 323, 324, reprinted in 1977 U.S.C.C.A.N. 1402-03.

⁵ See, *supra*, n.2.

petition for judicial review must be filed, and shall not postpone the effectiveness of such actions.

Michael S. Regan,
Administrator.

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